Sundra Rajoo a/l Nadarajah v Thomas Thomas @ Mohan a/l K Thomas & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-187–10/2021
AHMAD BACHE J
30 SEPTEMBER 2022

Civil Procedure — Expungement — Application for — Plaintiff applied to expunge part of defendants' affidavit in support — Whether paragraphs was scandalous and irrelevant and should be expunged

Civil Procedure — Striking out — Application for — Defendants applied to strike out plaintiff's claim — Plaintiff claimed against defendants for, among others, false imprisonment, malicious prosecution, misfeasance of public office — Whether striking out application ought to be allowed — Rules of Court 2012 O 18 r 19

The plaintiff was the Director of Asean International Arbitration Centre ('AIAC'). He had filed a claim against the defendants, ie the Attorney General ('AG') and his officers, Chief Commissioner of Malaysian Anti-Corruption Commission ('MACC') and his officers etc for false imprisonment, malicious prosecution, misfeasance of public office, amongst others. Vide encl 12, the defendants had filed an application to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court 2012. Vide encl 20, the plaintiff had made an application to expunge part of the defendants' affidavit in support. By virtue of the plaintiff's position as Director of the AIAC, the plaintiff was a High Officer within the meaning of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulation 1996 made pursuant to International Organizations (Privileges and Immunities) Act 1992 ('the Act') whereby the plaintiff was conferred like privileges and immunities as were accorded to a diplomatic agent in respect of acts and things done in his capacity as the High Officer. Pursuant to the Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966, the plaintiff could not be made liable 'to any form or arrest or detention' in respect of acts and things done in his capacity as a High Officer. The plaintiff was also immune from criminal prosecution in respect of such acts. Upon ceasing his tenure as the Director, the plaintiff was to be treated for the purpose of the said privileges and immunities as a former High Officer. In or around October 2018, a poison pen letter regarding the conduct of the plaintiff addressed to the Chief Commissioner of the MACC was widely circulated by email, which prompted the MACC to initiate an investigation. Following an arrest and detention on 21 November 2018, the plaintiff was

produced in handcuffs before the magistrate's court to remand him in the custody of the MACC for seven days. In the proceedings, the plaintiff argued that he had immunity from criminal proceedings. The learned magistrate denied the remand application. The MACC initiated an investigation against the plaintiff notwithstanding his immunity as a former High Officer in respect of acts done by him during his tenure as the Director of AIAC. The plaintiff applied for leave to commence judicial review proceedings in the High Court ('the JR application') seeking, amongst others, a declaration that he was immune from criminal proceedings as a former High Officer. In spite of the above, three charges were proffered against the plaintiff in the sessions court. The sessions court fixed the case for hearing the next day after the JR application leave hearing. The leave of the JR application was then dismissed by the High Court and the three charges were proffered against the plaintiff in the sessions court. The plaintiff pleaded not guilty to the three charges without prejudice to his immunity. Meanwhile, upon appeal, the Court of Appeal overturned the dismissal of the JR application leave and reverted it back to the High Court to be heard on its merits. The High Court allowed the JR application ('the HC decision'). The High Court found that the plaintiff was still immune from criminal proceedings in respect of acts or things done in his capacity as a Director of AIAC. The court proceeded to, amongst others, quash the three charges. The plaintiff appeared before the sessions court for a mention of the criminal proceeding despite the HC decision having quashed the three charges. The sessions court quashed the three charges. The HC decision was eventually affirmed by the Federal Court. Regarding this striking out application vide encl 12, the defendants contended that: (a) any civil suit against the AG pertaining to the exercise of his discretion under art 145(3) of the Federal Constitution was unsustainable; (b) the plaintiff had not sufficiently pleaded malice against the defendants; and (c) the plaintiff was caught by res judicata as the matters raised in the statement of claim could and should have been raised in the JR application. Regarding encl 20, the plaintiff argued that the impugned parts were scandalous and irrelevant and should be expunged.

Held:

(1) This was not a plain and straight forward case that would allow this case to be resolved summarily based on pleadings and affidavits evidence alone without calling the witnesses to testify. There were question of facts which had to be adduced in evidence in a full trial and some were denied by the defendants which denial had given rise to 'disputed facts'. The law was trite that when there were disputed facts, the matter could only be resolved by calling witnesses in a full trial. Further, witnesses had to testify to prove the liability and the quantum of damages to be awarded if the plaintiff succeeded in his claim. The defendants had also raised few questions of law and some questions of fact and law. Obviously all of

these needed ventilations, lengthy discussions and mature considerations by calling witnesses. Finally, striking out was a drastic act against the plaintiff as it had a finality in its effect whereby if allowed, the door of justice was closed to him without having an opportunity to call witnesses/to be heard but based on affidavit evidence only. Therefore, encl 12 was dismissed with costs as the suit was not obviously unsustainable, it was not scandalous, frivolous or vexatious, it would not prejudice the fair trial of the action and was not an abuse of the court's process (see paras 37–43).

(2) The averments/statements at para 56 and 57 of the first defendant's affidavits were scandalous as they were wholly unnecessary and unpleasant allegations, oppressive and should be expunged from the record. Not only had the AG misconceived the fact and the law that the Federal Court was validly empowered to make the decision it did, he had also misconceived the basis of the plaintiff's immunity from prosecution; that immunity arose from the relevant provisions of Act 485 which the Federal Court had ventilated and discussed and considered at length and finally decided in favour of the plaintiff. The plaintiff's special immunity was confined to his holding the post as Director of AIAC. Since he had now resigned, hence there was no longer any relevance or necessity for paras 56 to 57 to be used to support and to bolster the first defendant's application for this striking out, and to be remained on record. Therefore the plaintiff's application vide encl 20 was partially allowed (see paras 51 & 53–56).

[Bahasa Malaysia summary

Plaintif ialah Pengarah Pusat Timbang Tara Antarabangsa Asia ('AIAC'). Dia telah memfailkan tuntutan terhadap defendan, iaitu Peguam Negara ('PN') dan pegawainya, Ketua Pesuruhjaya Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') dan pegawainya dan lain-lain untuk tahanan salah, pendakwaan niat jahat, salah guna jawatan awam, antara lain. Melalui lampiran 12, defendan telah memfailkan permohonan untuk membatalkan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012. Melalui lampiran 20, plaintif telah membuat permohonan untuk menghapuskan sebahagian daripada afidavit sokongan defendan. Berdasarkan kedudukan plaintif sebagai Pengarah AIAC, plaintif adalah Pegawai Tinggi dalam pengertian Peraturan Pusat Timbang Tara Serantau Kuala Lumpur (Keistimewaan dan Kekebalan) 1996 yang dibuat menurut Akta Organisasi Antarabangsa (Keistimewaan dan Kekebalan) 1992 ('Akta') di mana plaintif telah diberikan keistimewaan dan kekebalan sama seperti yang diberikan kepada ejen diplomatik berkenaan dengan perbuatan dan perkara yang dilakukan atas kapasitinya sebagai Pegawai Tinggi. Menurut Jadual Akta Keistimewaan Diplomatik (Konvensyen Vienna) 1966, plaintif tidak boleh dipertanggungjawabkan 'kepada sebarang bentuk atau penangkapan atau penahanan' berkenaan dengan perbuatan dan perkara

A yang dilakukan atas kapasitinya sebagai Pegawai Tinggi. Plaintif juga kebal daripada pendakwaan jenayah berkenaan dengan perbuatan tersebut. Selepas menamatkan perkhidmatannya sebagai Pengarah, plaintif akan diperlakukan bagi tujuan keistimewaan dan kekebalan tersebut sebagai bekas Pegawai Tinggi. Pada atau sekitar Oktober 2018, surat layang berhubung kelakuan
B plaintif yang dialamatkan kepada Ketua Pesuruhjaya SPRM telah diedarkan secara meluas melalui emel, yang mendorong SPRM untuk memulakan siasatan. Susulan penangkapan dan penahanan pada 21 November 2018, plaintif telah digari di hadapan mahkamah majistret untuk direman dalam tahanan SPRM selama tujuh hari. Dalam prosiding itu, plaintif berhujah
C bahawa dia mempunyai kekebalan daripada prosiding jenayah. Majistret yang bijaksana menolak permohonan reman. SPRM memulakan penyiasatan terhadap plaintif walaupun beliau mempunyai kekebalan sebagai bekas Pegawai Tinggi berhubung perbuatan yang dilakukan oleh beliau semasa
D beliau memegang jawatan sebagai Pengarah AIAC. Plaintif memohon kebenaran untuk memulakan prosiding semakan kehakiman di Mahkamah Tinggi ('permohonan JR') memohon, antara lain, pengisytiharan bahawa beliau kebal daripada prosiding jenayah sebagai bekas Pegawai Tinggi. Walaupun dengan perkara di atas, tiga pertuduhan telah dikemukakan
E terhadap plaintif di mahkamah sesyen. Mahkamah sesyen menetapkan kes itu untuk dibicarakan pada hari berikutnya selepas perbicaraan kebenaran permohonan JR. Kebenaran permohonan JR kemudiannya ditolak oleh Mahkamah Tinggi dan ketiga-tiga pertuduhan itu dikemukakan terhadap plaintif di mahkamah sesyen. Plaintif mengaku tidak bersalah terhadap
F ketiga-tiga pertuduhan itu tanpa menjejaskan kekebalannya. Sementara itu, selepas rayuan, Mahkamah Rayuan membatalkan penolakan kebenaran permohonan JR dan mengembalikannya semula kepada Mahkamah Tinggi untuk didengar atas meritnya. Mahkamah Tinggi membenarkan permohonan JR ('keputusan MT'). Mahkamah Tinggi mendapati bahawa plaintif masih
G kebal daripada prosiding jenayah berkenaan dengan perbuatan atau perkara yang dilakukan atas kapasitinya sebagai Pengarah AIAC. Mahkamah meneruskan, antara lain, membatalkan tiga pertuduhan. Plaintif hadir ke mahkamah sesyen untuk sebutan prosiding jenayah walaupun keputusan MT telah membatalkan tiga pertuduhan. Mahkamah Sesyen membatalkan tiga
H pertuduhan itu. Keputusan MT akhirnya disahkan oleh Mahkamah Persekutuan. Berkenaan permohonan pembatalan melalui lampiran 12, defendan berpendapat bahawa: (a) apa-apa saman sivil terhadap PN berkaitan dengan penggunaan budi bicaranya di bawah perkara 145(3) Perlembagaan Persekutuan adalah tidak dapat dipertahankan; (b) plaintif tidak memplid niat
I jahat terhadap defendan; dan (c) plaintif tertangkap oleh res judicata kerana perkara yang dibangkitkan dalam pernyataan tuntutan boleh dan sepatutnya dibangkitkan dalam permohonan JR. Berkenaan lampiran 20, plaintif berhujah bahawa bahagian yang dipertikaikan adalah bersifat skandal dan tidak relevan dan harus dihapuskan.

Diputuskan:

(1) Ini bukanlah kes yang jelas dan mudah yang membolehkan kes ini diselesaikan secara ringkas berdasarkan pliding dan keterangan afidavit sahaja tanpa memanggil saksi untuk memberi keterangan. Terdapat persoalan fakta yang perlu dikemukakan sebagai keterangan dalam perbicaraan penuh dan ada yang dinafikan oleh defendan yang mana penafian telah menimbulkan 'fakta yang dipertikaikan'. Undang-undang adalah mantap bahawa apabila terdapat fakta yang dipertikaikan, perkara itu hanya boleh diselesaikan dengan memanggil saksi dalam perbicaraan penuh. Selanjutnya, saksi perlu memberi keterangan untuk membuktikan liabiliti dan kuantum ganti rugi yang akan diberikan sekiranya plaintif berjaya dalam tuntutannya. Defendan juga telah membangkitkan beberapa persoalan undang-undang dan beberapa persoalan fakta dan undang-undang. Jelas sekali semua ini memerlukan penyuaraan, perbincangan yang panjang dan pertimbangan matang dengan memanggil saksi. Akhir sekali, tindakan pembatalan adalah satu tindakan drastik terhadap plaintif kerana ia mempunyai muktamad dalam kesannya di mana jika dibenarkan, pintu keadilan ditutup kepadanya tanpa mempunyai peluang untuk memanggil saksi/untuk didengar tetapi berdasarkan bukti afidavit sahaja. Oleh itu, lampiran 12 telah ditolak dengan kos kerana saman itu tidak jelas tidak dapat dipertahankan, ia bukan bersifat skandal, remeh atau menyusahkan, ia tidak akan menjejaskan perbicaraan adil tindakan itu dan bukan penyalahgunaan proses mahkamah (lihat perenggan 37–43).

(2) Penegasan/penyataan di perenggan 56 dan 57 afidavit defendan pertama adalah bersifat skandal kerana ia adalah dakwaan yang tidak perlu dan tidak diingini, menindas dan harus dihapuskan daripada rekod. Bukan sahaja PN tersalah anggap fakta dan undang-undang bahawa Mahkamah Persekutuan diberi kuasa secara sah untuk membuat keputusan yang dibuatnya, beliau juga telah salah faham asas kekebalan plaintif daripada pendakwaan; kekebalan itu timbul daripada peruntukan Akta 485 yang berkaitan yang telah diisytiharkan dan dibincangkan dan dipertimbangkan oleh Mahkamah Persekutuan dengan panjang lebar dan akhirnya memutuskan yang memihak kepada plaintif. Kekebalan khas plaintif adalah terhad kepada beliau memegang jawatan sebagai Pengarah AIAC. Memandangkan beliau kini telah meletak jawatan, maka tiada lagi kaitan atau keperluan bagi perenggan 56 hingga 57 untuk digunakan untuk menyokong dan memperkukuh permohonan defendan pertama bagi pembatalan ini, dan untuk kekal dalam rekod. Oleh itu, permohonan plaintif melalui lampiran 20 dibenarkan sebahagiannya (lihat perenggan 51 & 53–56).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226, FC (refd)

Repco (M) Sdn Bhd v Tan Tho Fatt & Ors [2003] 6 MLJ 146, HC (refd)

Sangeet Kaur Deo v Chief Justice of the Federal Court of Malaysia [2019] MLJU 2048, HC (refd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)

Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negeri, Malaysia & Ors [2020] 10 MLJ 583, HC (refd)

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (folld)

Tan Wei Hong (a child suing through his guardian ad litem and next friend, Chuang Yin E) & Ors v Malaysia Airlines System Bhd & Ors [2017] 4 MLJ 540, CA (refd)

Wee Building Materials Sdn Bhd v Muhamed bin Maidin [1996] MLJU 502; [1996] 1 LNS 299, HC (refd)

Legislation referred to

Rules of the Federal Court 1995 r 137

Diplomatic Privileges (Vienna Convention) Act 1966 Schedule

Federal Constitution arts 8, 145, 145(3)

Kuala Lumpur Regional Center for Arbitration (Privileges and Immunites) Regulations 1996

Malaysian Anti-Corruption Commission Act 2009 s 30(1)(a)

Rules of Courts 2012 O 18, O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), (2), O 41 r 6

Shamsul Bolhassan (with Andi Razaliyana A Dadi, Mohd Ashraf Abd Hamid and Abdul Rashid Sulaiman) (Attorney General's Chambers) for the appellants.

Malik Imtiaz Sarwar (with TJ Lee, Azyan Ibrahim, Katleen Ramanathan, Cheok Wei Chin and Khoo Suk Chyi) (Cheok Ng Lee Law Chambers) for the respondent.

Ahmad Bache J:

INTRODUCTION

[1] The plaintiff was at material times the Director of Asean International Arbitration Center (AIAC). He had filed a claim against the defendants, ie the Attorney General and his officers, Chief Commissioner of SPRM and his

officers, etc, for false imprisonment, malicious prosecution, misfeasance of public office, amongst others.

[2] Vide encl (12), the defendants had filed an application to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court 2012. Vide encl (20), the plaintiff had made an application to expunge part of the defendants' affidavit in support. After hearing submissions from both parties, this court had dismissed the striking out application by the defendants vide encl (12) and allowed partly the plaintiff's application for encl (20) with costs.

[3] Dissatisfied, the defendants had filed an appeal to the Court of Appeal for both enclosures.

[4] Herewith are the grounds for both decisions for encls (12) and (20) and are consolidated together.

BRIEF FACTS

[5] On 1 March 2010, the plaintiff was appointed as the Director of AIAC. AIAC was set up under the auspices of the then Asian African Legal Consultative Committee, now known as AALCO. Originally AIAC was named as Regional Center for Arbitration Kuala Lumpur ('RCAKL') on 17 October 1978 after which it was renamed as KLRCA and then as AIAC in February 2018. By virtue of the plaintiff's position as Director of the AIAC, the plaintiff was a High Officer within the meaning of the Kuala Lumpur Regional Center for Arbitration (Privileges and Immunites) Regulations 1996 ('the KLRCA Regulations 1996') made pursuant to Act 485 whereby the plaintiff was conferred like privileges and immunities as are accorded to a diplomatic agent in respect of acts and things done in his capacity as the High Officer.

[6] Pursuant to the Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966 (Revised 2004) ('Act 636'), the plaintiff could not be made liable 'to any form or arrest or detention' in respect of acts and things done in his capacity as High Officer. The plaintiff was also immuned from criminal prosecution in respect of such acts.

[7] Upon ceasing his tenure as the Director, the plaintiff was to be treated for the purpose of the said privileges and immunities as a former High Officer. As a former High Officer, he enjoyed immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer. This includes immunity from criminal prosecution.

[8] The said matters were confirmed by the Federal Court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209.

A **[9]** For the purpose of these two applications, it is germane for this court to give a brief history surrounding these suit and applications. It is this. In or around October 2018, a poison pen letter regarding the conduct of the plaintiff addressed to Dato' Sri Shukri Abdul, Chief Commssioner of the MACC dated 28 September 2018 was widely circulated by email, which prompted the B MACC to initiate an investigation.

[10] Following an arrest and detention on 21 November 2018, the plaintiff was produced in handcuffs before the magistrate's court at Putrajaya to remand him in the custody of the MACC for seven days.

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[11] In the proceedings, the plaintiff's and AIAC's counsel argued that he had immunity from criminal proceedings. The learned magistrate denied the remand application. Meanwhile, the government through the Ministry of Foreign Affairs has made several requests to AALCO to waive the plaintiff's D immunity.

[12] After the dismissal of the remand application, the MACC initiated an investigation against the plaintiff notwithstanding his immunity as a former E High Officer in respect of acts done by him during his tenure as the Director of AIAC. Amongst others were the plaintiff was ordered to attend seven inspections at the MACC in November and December 2018 pursuant to s 30(1)(a) of the Malaysian Anti-Corruption Commission Act 2009.

F **[13]** According to the plaintiff, concerned that Tan Sri Tommy Thomas and the MACC did not recognise his immunity and were considering to prosecute him, on 5 March 2019 the plaintiff applied for leave to commence judicial review proceedings against the AG, MOFA, MACC and the Government of Malaysia ('JR respondents') in the Kuala Lumpur High Court ('JR G application'). The plaintiff sought, amongst others, a declaration that he was immuned from criminal proceedings as a former High Officer.

[14] On 25 March 2019, inspite of the above, three charges were proffered against the plaintiff in the Kuala Lumpur Sessions Court.

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[15] According to the plaintiff further, Tan Sri Tommy Thomas, DPP Kamal and DPP Ann Khong also knew that the leave hearing for the JR application was on the next day.

I **[16]** DPP Kamal sought a warrant of arrest against the plaintiff but the sessions court judge refused to issue it. The sessions court then fixed the case for hearing the next day after the JR application leave hearing. A revision of this decision was immediately sought in the High Court. The High Court deferred the revision for the JR application leave hearing to conclude first.

[17] The leave for the JR application was dismissed by the High Court on 26 March 2019. Immediately after that, the three charges were proffered against the plaintiff in the Kuala Lumpur Sessions Court.

[18] The plaintiff pleaded not guilty to the three charges without prejudice to his immunity. He was ordered to post bail and surrender his passport, which consequently left him with no choice but to postpone and rearrange all of his international arbitration works as he was unable to travel out of the country.

[19] Meanwhile, upon appeal, the Court of Appeal overturned the dismissal of the JR application leave and revert it back to the High Court to be heard on its merits.

[20] On 31 December 2019, the High Court allowed the JR application ('HC decision').

[21] At this stage, the plaintiff had amended the JR application seeking for a certiorari order to quash the three charges.

[22] The High Court found that the plaintiff was, and still is, immuned from criminal proceedings in respect of acts or things done in his capacity as a Director of AIAC. In *Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negeri, Malaysia & Ors* [2020] 10 MLJ 583, Mariana Yahya J said:

> [71] I agree with the applicant's learned counsel submission that legal process means civil and criminal process. *I am of the view that if Parliament has intended to exclude the immunity from criminal process then it has to be specifically spelled out in Part II of the Second Schedule of Act 485. It is also my considered view that the limits of immunities provided for a former high officer is very clear that he is immune from suit and other legal process in respect of acts and things done in his capacity as such an officer unlike a high officer who enjoy privileges and immunities as are accorded to a diplomatic agent.*

[23] The court proceeded to, amongst others, quash the three charges.

[24] The High Court also found as a matter of fact that the plaintiff was forced to resign. Mariana Yahya J said:

> [61] It is undisputed fact that the applicant was a director of AIAC at the time he was arrested (ie 20 November 2018) and thereafter was forced to resign as director on 21 November 2018. The applicant then became a former high officer after his resignation. Pursuant to s 4(1)(b)(ii) of Act 485, the applicant still enjoy immunities as provided under Part II of the Schedule.

[25] On 22 January 2020, the plaintiff appeared before the sessions court for

a mention of the criminal proceeding despite the HC decision having quashed the three charges. The sessions court disagreed with the DPP and quashed the three charges.

[26] The HC decision was eventually affirmed by the Federal Court on 9 June 2021 in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 ('FC decision'). The Federal Court concluded that the plaintiff had at all material times enjoyed immunity from criminal proceedings as a former High Officer. The court also concluded that Tan Sri Tommy Thomas knew this to be the case.

[27] So much of the basis that these two applications were premised on. Regarding this striking out application vide encl (12) in essence, the defendants contended that, any civil suit against the Attorney General pertaining to the exercise of his discretion under art 145(3) of the Federal Constitution is unsustainable. Second, the plaintiff has not sufficiently pleaded malice against the defendants. Third, the plaintiff is caught by res judicata as the matters raised in the SOC could and should have been raised in the JR application.

THE LAW ON STRIKING OUT (O 18 R 19)

[28] Order 18 r 19(1)(a), (b), (c) and (d) of the Rules of Courts 2012 gives court the power to strike out the plaintiff's claim, if the defendant succeeded in fulfilling certain criterias.

Order 18 r 19(1), (a), (b), (c) and (d) reads:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair Trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible under subparagraph (1)(a).

[29] An applicant/defendant applying for striking out can rely on any one or more than one sub-paras (a)–(d). There is no law to say otherwise. For sub-para (a), no affidavit evidence is admissible (see r 19(2)). For other

sub-paras, ie (b), (c) and (d), affidavit evidence should be admissible.

[30] The striking out procedure is summary in nature. It should only be adopted when it is conspicuously clear that the claim on the face of it is *obviously unsustainable*, ie the test is whether on the face of the statement of claim alone (ie without looking at the affidavit evidence) whether the court is prepared to conclude that the cause of action is obviously unsustainable — (see *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 (FC)).

[31] It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. The statement of claim might not be perfect and 'not so strong' in supporting the claim, but the mere fact that the case is vague and is unlikely to succeed at trial is not a good ground for the claim to be struck out — (see *Bandar Builder*).

[32] The Federal Court in the case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 (FC) said that any serious question of law which involves lengthy arguments and cases which involves lengthy and disputed facts should not be struck out summarily, but must go through a full trial where viva voice evidence are taken. The court said the following:

> [26] ... (d) If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC.
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> [27] The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75, had adopted the well-settled principle of striking out in the following passage A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court).

[33] Perhaps the principles regarding striking out are best summarized in the case of *Tan Wei Hong (a child suing through his guardian ad litem and next friend, Chuang Yin E) & Ors v Malaysia Airlines System Bhd & Ors* [2017] 4 MLJ 540, where the Court of Appeal at para 7 laid down the following principles:

> [7] The court will adopt the following as principles applicable to the consideration of an application to strike out pleadings and endorsements:

(a) in considering the defendants' application under O 18 r 19(1)(a), no affidavit evidence is admissible;

(b) all the averments in the statement of claim must be assumed to be true;

(c) the court should only exercise its powers sparingly and only in clear cases;

(d) the test to be applied is whether on the face of pleadings, the claim is obviously unsustainable. The matter must be unarguable or almost incontestably bad;

(e) the burden is on the defendants to show to the court that the plaintiffs' claim is so plain and obviously unsustainable or in other words, the plaintiffs' claim is bound to fail at trial;

(f) where there is a dispute as to the factual matrix of the case, the court would not strike out the pleadings and endorsements;

(g) the power to strike out pleadings and endorsements should be exercised after the court has considered all facts, but the court must not embark on a minute examination of the documents and the facts of the case as this is solely reserved for the trial judge.

ANALYSIS AND FINDING OF THIS COURT — REGRADING THE STRIKING OUT APPLICATION (ENCL 12)

[34] This court had perused all the cause papers, (including affidavits and pleadings of parties) and had also heard submissions of counsels for both parties. Having done so, this court had ruled that the application by the defendants to strike out the plaintiff's writ and statement of claim be dismissed with costs for the reasons as explained in the ensuing paragraphs:

[35] Here, the fact unfolded by reading the pleadings are very long and it is obvious that it is not a straight forward case. That in itself requires that this case be heard in a full trial as it cannot be resolved summarily at this juncture.

[36] As all the averments in the statements of claims are presumed to be true and that 'technically' merit of the case is not an issue, from the pleadings, it was obvious that there was a cause of action against the defendants which was not 'obviously unsustainable'. Hence striking out is not permisable.

[37] Given the above, this is not a plain and straight forward case that would allow this case to be resolved summarily based on pleadings and affidavits evidence alone without calling the witnesses to testify.

[38] Central to the issue was the question as to whether there was breaches (as claimed in the SOC) committed by the defendants. The plaintiff claimed that he was abused, deprived of his rights under the Federal Constitution, was

forced to resign, was harrased, was deprived of his movements etc These are all question of facts which have to be adduced in evidence in a full trial and some are denied by the defendants which denial has given rise to 'disputed facts'. The law is trite that when there are disputed facts, the matter can only be resolved by calling witnesses in a full trial. Hence striking out is not permisable.

[39] Further, witnesses have to testify to prove the liability and the quantum of damages to be awarded if the plaintiff succeeded in his claim. Hence striking out is not possible in this case, at this juncture.

[40] The defendants had also raised few questions of law and some questions of fact and law. For example question arises as to whether can the Attorney General be sued in exercising his discretion under art 145 of the Federal Constitution on a case to case basis. The next is the question of res judicata ie can the plaintiff file this claim as it involves the issue of immunity which was already granted by the Federal Court earlier. Question also arises as to what extent does that decision affect this claim. Also there was an issue of bad faith raised.

[41] Obviously all the above needs ventilations, lenghty discussions and mature considerations by calling witnesses (see *Sivarasa Rasiah*). Hence striking out should not be allowed.

[42] Finally, striking out is a drastic act against the plaintiff as it has a finality in its effect whereby if allowed, the door of justice is closed to him without having an opportunity to call witnesses/to be heard but based on affidavit evidence only. No wonder some judges consider O 18 as draconian. This is because once granted, the plaintiff will never have his day in court. Hence the discretion should be exercised with utmost caution and be allowed sparingly (see *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235).

[43] For the above reasons, encl (12) was dismissed with costs as this court ruled that the suit is not *obviously unsustainable*, it is not scandalous, frivolous or vexatious, it would not prejudice the fair trial of the action and is not an abuse of the court's process (see O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012).

APPLICATION TO EXPUNGE PARAS 55–58, AFFIDAVITS IN SUPPORT OF THE DEFENDANT BY THE PLAINTIFF (ENCL 20)

[44] The plaintiff vide encl (20) ('expungement application'), sought to expunge four paras, namely, paras 55–58 from the first defendant's affidavit affirmed on 5 November 2021 (encl (13)), and which was filed in support of the defendants' striking out application ('D1's first affidavit'). This application

is made permisable under O 41 r 6 of the Rules of Court 2012, which provides:

> The Court may order to be struck out any affidavit any matter which is *scandalous, irrelevant or otherwise oppressive*.

[45] This court ruled that, so long as the passages are relevant, not scandalous and not oppressive, they are admissible as decided in the following cases:

(a) in *Repco (M) Sdn Bhd v Tan Tho Fatt & Ors* [2003] 6 MLJ 146 Abdul Malik Ishak J (as His Lordship then was) said:

> The law is quite clear on this matter. The court will only strike out a matter that is scandalous, irrelevant and/or otherwise oppressive. The court will not strike out a matter which is scandalous but not irrelevant, nor would the court strike out a matter which is irrelevant, but not scandalous.

(b) in *Wee Building Materials Sdn Bhd v Muhamed bin Maidin* [1996] MLJU 502; [1996] 1 LNS 299 Haidar J (as His Lordship then was):

> If I understand the submission of counsel for the defendant correctly, he would seem to equate 'inadmissible evidence' (by virtue of s 126 of the Act) as coming under the ground 'irrelevant'. I do not think this is the correct approach as by s 2 of the Act, the Act is not extended to affidavits. In that event what I have to consider is whether the matters deposed in the affidavit ...are irrelevant to the issues for the determination of the court.

The paras 55–58 sought to be expunged

[46] The paragraphs sought to be expunged are reproduced below:

> 55. Pertimbangan tersebut tidak wujud dalam kes ini. Plaintif bukan warga negara asing. Plaintif adalah seorang warganegara Malaysia. Malaysia adalah negara tuan rumah dan kuasa Pengarah diperolehi melalui pelantikannya oleh Kerajaan Malaysia. Di bawah Perjanjian AALCO, Pengarah AIAC 'shall be a national of Malaysia and shall be appointed by the Host Government in consultation with the SecretaryGeneral of the Organization'. Oleh itu, tiada 'negara asal' lain untuk plaintif dibicarakan atas jenayahnya. Beliau tidak boleh dihantar balik ke luar negara untuk menghadapi pendakwaan dan keadilan. Oleh itu, beliau bertanggungjawab di bawah undang-undang jenayah Malaysia; sama seperti mana-mana individu yang bermastautin di sini.
>
> 56. Dengan memberikan plaintif imuniti daripada pendakwaan jenayah di Malaysia akan meletakkan beliau secara tunggal pada tahap mengatasi semua 30 juta rakyat Malaysia dengan berkebal daripada proses undang-undang. Malahan beliau akan mengatasi sembilan Raja-Raja Malaysia yang boleh disaman atau dibicarakan atas kesalahan jenayah di Mahkamah Khas — menurut perkara 181 dan 182 Perlembagaan Persekutuan.
>
> 57. Seseorang Pengarah AIAC akan dapat memboroskan dana dan mendatangkan manfaat bagi rakan-rakannya dengan menggunakan kapasitinya sebagai Pengarah,

bebas daripada pendakwaan. Itu tidak betul. Yang memparahkan lagi keadaan, dia boleh melakukan pembunuhan tanpa hukuman. Cadangan sedemikian melanggar perkara 8 Perlembagaan Persekutuan bahawa semua orang adalah sama rata di sisi undang-undang dan berhak mendapat perlindungan yang sama rata di sisi undang-undang. Walau apa jua status di bawah undang-undang antarabangsa awam, imuniti Plaintif yang dikatakan tersebut adalah bertentangan dengan perlembagaan di bawah undangundang Malaysia.

58. Dalam apa jua keadaan sekalipun, tafsiran yang mungkin dapat mengharmonikan kewujudan imuniti bagi plaintif ialah Seksyen 8A(1) Akta 485, yang menyatakan bahawa 'Keistimewaan dan imuniti yang diberikan di bawah Akta ini diberikan demi kepentingan organisasi antarabangsa dan organisasi luar negara dan bukan bagi faedah peribadi individu.' Oleh itu, dengan memberikan manfaat kepada tafsiran plaintif, pada pendapat saya, berdasarkan pembacaan Perjanjian AALCO dan Akta 485, imuniti yang diberikan kepada plaintif (sekiranya ada) tidak meliputi tiga tuduhan kerana tuduhan-Tuduhan tersebut adalah berkaitan dengan tindakan yang dilakukan untuk faedah peribadinya. Pastinya, mencuri wang daripada dana amanah tidak mungkin dalam apa jua demi kepentingan AIAC.

[47] The English Language translation reads as follows:

55. These considerations were not present in the instant case. The plaintiff is not a foreigner. The plaintiff is a Malaysian citizen. Malaysia is the host country and the powers of the Director are derived by his appointment by the Government of Malaysia. Under the AALCO Agreement, the Director of the AIAC 'shall be a national of Malaysia and shall be appointed by the Host Government in consultation with the Secretary-General of the Organization'. There is therefore no other 'home country' for plaintiff to be tried for crimes. He cannot be repatriated abroad to face prosecution and justice. He is therefore answerable to the criminal laws of Malaysia; just like any person resident here.

56. *For the plaintiff to have immunity from criminal prosecution in Malaysia would put him solely on a level above all the 30 million Malaysians in being immune from the due process of the law. He would even be a class above the nine Rulers of Malaysia, who may themselves be sued or tried for criminal offences in the Special Court — pursuant to arts 181 and 182 of the Federal Constitution.*

57. *A Director of the AIAC would be able to squander funds and benefit friends using his capacity as Director, free from prosecution. That cannot be correct. Worse still, he could commit murder with impunity. Such a proposition violates art 8 of the Federal Constitution that all persons are equal before the law and entitled to equal protection of the law. Whatever the status under public international law, the plaintiff's alleged immunity is unconstitutional under the laws of Malaysia.*

58. In any event, a possible interpretation harmonizing an existence of immunity for the plaintiff is s 8A(1) of Act 485, which states that 'The privileges and immunities conferred under this Act are granted in the interests of the international organization and overseas organization and not for the personal benefit of the individuals.' Thus, giving the benefit to the plaintiff's interpretation, in my opinion, based on a reading of the AALCO Agreement and Act 485, the immunity

conferred on the plaintiff (if any) did not extend to the three charges as they related to acts done for his personal benefit. Surely, stealing money from trust funds can never be in the interests of AIAC.

[48] The law on this issue was further explained in the case of *Sangeet Kaur Deo v Chief Justice of the Federal Court of Malaysia* [2019] MLJU 2048. The requirements of scandalous, irrelevant or oppressive are disjunctive:

55.1. Scandalous refers to statements that are 'wholly unnecessary and irrelevant and not just unpleasant allegations'.

55.2. Irrelevant statements are statements that do 'not relate to the fact in issue of the case at hand or does not have any bearing to the relief prayed for by parties to the proceedings'.

[49] Here the plaintiff argued that the impugned parts are scandalous and irrelevant and should be expunged. After perusing and considering the submissions of parties, this court observed that, Tan Sri Tommy Thomas has taken the view that the plaintiff did not enjoy immunity from criminal prosecution in respect of the three charges. He opined that such a proposition violates art 8 of the Federal Constitution and is therefore unconstitutional. This stand taken by him was notwithstanding the Federal Court decision in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* which makes it plain that the plaintiff *did* enjoy such immunity.

[50] This court observed that the Federal Court, after having examined all the relevant laws, including international laws, came to the view that the plaintiff is immuned from criminal prosecution in respect of acts or things done in his capacity as a Director of AIAC. The Federal Court had found that the proffering of the three charges violated that immunity. Being the highest court of the land, that decision was final.

[51] Against the backdrop of the Federal Court's ruling and the grounds given, this court ruled that the averments/statements at paras 56–57 of the first defendant's affidavits are scandalous and oppressive and should be expunged from the record.

[52] The Federal Court's decision was and is declaratory of the law as it stands today. Hence, Tan Sri Tommy Thomas, as much as this court under the stare decisive doctrine, are bound by this decision until it is set aside by another panel of the Federal Court. Every citizen, more so the AG/Tan Sri Tommy Thomas should abide by that decision. It is wrong, for Tan Sri Tommy Thomas to now say that the Federal Court's decision is unconstitutional and that the Federal Court has put the plaintiff above the Nine Rulers in Malaysia. Tan Sri Tommy Thomas averred:

He would even be a class above the 9 Rulers in Malaysia, who may themselves be sued or tried for criminal offences in the Special Court — pursuant to Articles 181 and 182 of the Federal Constitution.

[53] This court ruled that the statements at paras 56 and 57 are scandalous as they are wholly unnecessary and unpleasant allegations. If Tan Sri Tommy Thomas as the Attorney General is not satisfied with the decision of the Federal Court, he should have filed a review (under r 137) and not to aver an affidavit to vent his dissatisfaction in that form which with respect, is as mentioned earlier, in itself scandalous. Further, the Attorney General may also wish to initiate amendments to the relevant provision in future to be tabled before Parliament.

[54] This court also ruled that not only has Tan Sri Tommy Thomas misconceived the fact and the law that the Federal Court was validly empowered to make the decision it did, he has also misconceived the basis of the plaintiff's immunity from prosecution; that immunity arises from the relevant provisions of Act 485 which the Federal Court had ventilated and discussed and considered at length and finally decided in favour of the plaintiff.

[55] It is germane to note that the plaintiff's special immunity as alluded to earlier is confined to his holding the post as Director of AIAC. Since he has now resigned, hence there was no longer any relevance or necessity for paras 56–57 to be used to support and to bolster the first defendant's application for this striking out, and to be remained on record. Further this court had already decided earlier that the striking out application ie vide encl (12) was dismissed. Hence the First defendant will have to testify in open court in a full trial rendering paras 56–57 redundant now and hence should be expunged from the record.

[56] Hence for the reasons above, the plaintiff's application vide encl (20) was partially allowed.

CONCLUSION (FOR ENCLS (12) AND (20))

[57] In the upshot, premised on the foregoing reasons, this court:

(a) dismissed the defendants' application for striking out vide encl (12) with costs of RM10,000 to the plaintiff; and

(b) allowed partially the plaintiff's application vide encl (20) to expunge the first defendant's affidavit at paras 56–57. Nominal costs of RM2,000 to the plaintiff.

A *Order accordingly.*

Reported by Nabilah Syahida Abdullah Salleh

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